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Railway Labor Act -- Rights of Minority Groups to Membership in Labor Union Acting as Statutory Bargaining Agent

Henry E. Frye

employees work on the blueprints and drawings which are used by contractors to improve such facilities of interstate commerce, one step removed. The work of these employees is so directly and vitally related to the functioning of a facility of interstate commerce, however, as to be, in practical effect, a part of it rather than isolated local activity. The clerks and stenographers were as much an aid in preparing the blueprints and drawings as were the fieldmen and draftsmen because all were necessary for the final product.

While enlarging the "in commerce" section, the Court refused to deal with the "production of goods" question presented to them by the Fourth Circuit. From this refusal, a negative implication may be drawn that the Court is restricting the "production of goods" section in conformity with the intentions of the 1949 Amendments.[18]

RICHARD G. BADGETT
CONNIE E. BOLDEN

Railway Labor Act—Rights of Minority Groups to Membership in Labor Union Acting as Statutory Bargaining Agent

Several Negro firemen employed by various southern railroads brought a class action in federal court, seeking admission to membership in the Brotherhood of Locomotive Firemen and Enginemen, their statutory bargaining representative under the Railway Labor Act. Negro firemen are excluded from membership in the Brotherhood because its constitution limits membership to applicants "white born." *Held,* that the action be dismissed. The Brotherhood is a private association whose membership policies are not subject to judicial control; the plaintiffs have failed to show that an agency of the federal government is responsible for their plight.[1]

The great majority of unions in this country do not practice racial discrimination in membership.[2] At least thirty-nine union constitutions,

[18] These changed the words "necessary" to "closely related and directly essential" as a limitation upon the "fringe area" under the production clause. 29 C.F.R. § 776.17(a) (1958) (The Administrator of the Wage and Hour Division of the U.S. Department of Labor has accepted this legislative history to the effect that the 1949 amendment is intended to narrow the scope of coverage under the "engaged in production of goods for commerce" clause.) See 95 Cong. Rec. 14880 (1949) (remarks of Senator Taft). 95 Cong. Rec. 11001 (1949) (remarks of Congressman Lucas).

[1] Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 262 F.2d 359 (6th Cir. 1958), *cert. denied,* 359 U.S. 935 (1959).

[2] Summers, *Admission Policies of Labor Unions,* 61 Q.J. ECON. 66-107 (1946). See generally, NORTHRUP, ORGANIZED LABOR AND THE NEGRO (2d ed. 1944). As one of its "Objects and Principles," the AFL-CIO in its constitution undertakes "to encourage all workers without regard to race, creed, or color or national origin to share in the full benefits of union organization." AFL-CIO CONST. art. II, § 4. This provision was criticized on the grounds that it did not recognize the right of all persons to "full membershp" in trade unions. HANDBOOK OF UNION GOVERN-

covering 4,320,551 persons, contain specific provisions which require that all persons qualified for membership are to be admitted without regard to their race, creed, or color.[3] The constitution of the United Steel Workers of America, for example, provides that "all working men and working women, regardless of race, creed, or color, or nationality . . . are eligible to membership."[4] This seems to be the general practice among industrial unions.[5] A substantial minority of unions, however, generally limited to skilled craft and railroad unions, continue to exclude Negroes and certain other racial groups either by explicit provision or by general practice.[6] The big-four railroad brotherhoods, which control most of the workers in the operating department of the major railroads, have explicit constitutional prohibitions which bar Negroes from membership.[7] These four brotherhoods have a combined membership of 414,197.[8] Some unions do not exclude Negroes entirely, but relegate them to inferior locals, under the jurisdiction of adjoining white locals.[9] Others, especially in the South, simply maintain "separate but equal" locals for whites and non-whites.[10]

Though the number of unions with racial discriminatory policies is numerically small, the problem is of considerable importance because of

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MENT STRUCTURE AND PROCEDURES, NATIONAL INDUSTRIAL CONFERENCE BOARD 17 (1955). For the full text of the AFL-CIO constitution as ratified by the AFL-CIO convention, December 5, 1955, see 36 L.R.R.M. 164 (1956). The AFL-CIO has taken some concrete steps toward eliminating racial discrimination in union membership. Hutchinson, *The Constitution and Government of the AFL-CIO*, 46 CALIF. L. REV. 739, 743 & n. 10 (1958).

[3] HANDBOOK, *op. cit. supra* note 2, at 64. The 194 unions covered by the survey have a declared membership of 17,513,798, approximately 16½ million of whom are in the United States. *Id.* at 7.

[4] *Id.* at 64.

[5] The CIO, organized on an industrial basis, has made non-discrimination one of its basic principles, and has countenanced no internationals which exclude workers because of color or race. NORTHRUP, *op. cit. supra* note 2, at 14-16. No CIO union has a constitutional prohibition barring Negroes and other racial minorities. Fourteen unions, with nearly half of the CIO membership, have constitutional provisions containing anti-discrimination clauses. HANDBOOK, *op. cit. supra* note 2, at 63, Tables 30 and 31.

[6] A survey of 185 international unions revealed that 32 unions with a total membership of 2,500,000 excluded Negroes either by constitutional provision or established practice. Summers, *supra* note 2.

[7] HANDBOOK, *op. cit. supra* note 2, at 64. A similar provision in the constitution of the National Postal Transport Association, limiting membership to "Caucasians or North American Indians only," was recently repealed. AFL-CIO News, Oct. 4, 1958, p. 6, col. 4.

[8] Brotherhood of Locomotive Engineers, 77,197; Brotherhood of Locomotive Firemen and Enginemen, 100,000; Brotherhood of Railroad Trainmen, 205,000; and Order of Railway Conductors and Brakemen, 32,000. SOURCEBOOK OF UNION GOVERNMENT STRUCTURE AND PROCEDURES, NATIONAL INDUSTRIAL CONFERENCE BOARD 218-219 (1956).

[9] Summers, *supra* note 2, at 69. For some cases involving such auxiliary locals, see, James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).

[10] HANDBOOK, *op. cit. supra* note 2, at 17. See, *e.g.*, Davis v. Brotherhood of Ry. Carmen, 272 S.W.2d 147 (Tex. Civ. App. 1954).

the nature of the unions involved. The skilled craft unions and the railroad brotherhoods are among the most powerful unions in the United States and control many of the higher paying and more desirable jobs.[11]

The Importance of Membership in the Union

Under the Railway Labor Act,[12] the majority of employees of a craft or class elect a bargaining representative for the entire craft or class. This representative, usually a labor union, is then certified by the National Mediation Board. Once such a union is certified, it becomes the exclusive bargaining representative of all employees in the unit.[13] The individual employee loses all freedom to make his own contract or to bargain in his own behalf. The compulsory power of the statutory bargaining union extends both to the making of the collective bargaining contract and, in practice, to the settlement of all grievances arising under the contract.[14] In the negotiation and administration of the collective bargaining contract, the conflicting interests of different groups are resolved, and the available gains distributed among the various workers. Since the non-union worker cannot attend meetings of the union or vote for the union officials who negotiate and administer the collective bargaining contract, he cannot be assured that his interests will always be protected.[15] This is especially true where all of the members of a minority race are excluded from the union.[16]

Court decisions have made it clear that a union certified as the statutory bargaining representative must fairly represent both its members and non-members.[17] However, the history of the railway labor movement shows that the all-white brotherhoods have not only failed fairly to represent the interests of the non-member Negroes, but have sought, through overt and covert means, to drive them from their jobs.[18] The

[11] See generally, NORTHRUP, *op. cit. supra* note 2, at 6-34, 49-100, 211-17, 233, 234. For a detailed analysis of the effects of discrimination in economic terms, see BECKER, THE ECONOMICS OF DISCRIMINATION (1957).

[12] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1952).

[13] "The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." Steele v. Louisville & N. R.R., 323 U.S. 192, 200 (1944), *citing* Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944).

[14] For a discussion of the character of collective bargaining, see Summers, *The Public Interest in Union Democracy,* 53 NW. U.L. REV. 610 (1958).

[15] "(T)he union is the workers' sole spokesman in this process of industrial government which so completely regulates his working life. The union makes critical choices which bind him and control his very livelihood, and his only voice of preference or protest is within the union." *Id.* at 617.

[16] Raugh, *Civil Rights and Liberties and Labor Unions,* 8 LAB. L.J. 874 (1957); Hewitt, *The Right to Membership in a Labor Union,* 99 U. PA. L. REV. 919 (1951); Summers, *The Right to Join a Union,* 47 COLUM. L. REV. 43 (1947).

[17] See 36 N.C.L. REV. 529 (1958) for a discussion of these cases.

[18] The late Chief Judge of the Fourth Circuit, Judge John J. Parker, in a case involving one of the collective bargaining contracts negotiated by the Locomotive

remedy envisioned by the Court in *Steele v. Louisville & N. R.R.*[19] and related cases has not put an end to the abuses which the Court recognized as existing.[20]

Remedy: Fair Employment Practices Commissions

Perhaps the most effective remedy in dealing with the problem of racial discrimination in union membership has been the state Fair Employment Practice Laws.[21] Several states have legislation creating specialized commissions which have as one of their purposes the elimination of discrimination in employment.[22] These statutes generally make

Firemen (BLFE), traced a portion of this history as follows:

> (T)he record in the case before us . . . makes [it] clear that the agreement of February 18, 1941, was obtained in the course of a campaign which had been conducted by the Brotherhood for a number of years to eliminate Negro firemen from the service of the railroads. Prior to 1919, when the first collective bargaining agreement was negotiated by the Brotherhood, at least 85% of the locomotive firemen on the defendant railroad were Negroes. Although there had been agitation by the Brotherhood prior to that time for the elimination of Negroes from the service, the agitation seems to have become more effective when the Brotherhood was recognized as bargaining agent, and in 1927 it secured an agreement that one-third of the firemen should be promotable or white firemen. Two years later, in 1929, this proportion was raised by agreement to 50%. Later, following a campaign openly designed to get rid eventually of all the Negro firemen, the agreement here complained of was negotiated; and today only 35% of the firemen in the service of defendant railroad are Negroes. Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 476 (4th Cir. 1951).

For the history of racial discrimination in trade unions, see NORTHRUP, ORGANIZED LABOR AND THE NEGRO, *supra* note 2.

[19] 323 U.S. 192 (1944).

[20] Consider the Supreme Court's comments on the activities of the BLFE several years after the decision in *Steele, supra* note 19: "It is needless to recite additional details of the present case. What it adds to the governing facts of the earlier cases is a continuing and willful disregard of rights which this Court in unmistakable terms has said must be accorded to Negro firemen." Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232, 234 (1949).

[21] For studies of the various state anti-discrimination commissions, see: 3 RACE REL. L. REP. 1085-1108 (1958); Meiners, *Fair Employment Practices Legislation*, 62 DICK. L. REV. 31-69 (1957); STAFF OF SUBCOMM. ON LABOR AND LABOR MANAGEMENT RELATIONS, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 82D CONG., 2D SESS., STATE AND MUNICIPAL FAIR EMPLOYMENT LEGISLATION (Comm. Print 1952).

[22] ALASKA COMP. LAWS ANN. §§ 43-5-1 to -10 (Cum. Supp. 1958); COLO. REV. STAT. ANN. §§ 80-24-1 to -8 (Supp. 1957); CONN. GEN. STAT. §§ 7400-07 (Supp. 1955); ILL. ANN. STAT. ch. 127, §§ 214.1-.5 (Smith-Hurd 1953); IND. ANN. STAT. §§ 40-2301 to -2306 (1952); KAN. GEN. STAT. ANN. §§ 44-1001 to -1008 (Supp. 1957); MD. ANN. CODE art. 49B §§ 1-10 (1957); MASS. ANN. LAWS ch. 6, §§ 17, 56 (1952); MASS. ANN. LAWS ch. 151B, §§ 1-10 (1957); MASS. ANN. LAWS ch. 151C, §§ 1-5 (1957); MICH. STAT. ANN. §§ 17.458(1)-(11) (Supp. 1957); MINN. STAT. ANN. §§ 363.01-.13 (1957); MO. SESS. LAWS 1957, S.C.S.H.B. 125, at 299; N.J. STAT. ANN. §§ 18-25-1 to -28 (Supp. 1957); N.M. STAT. ANN. §§ 59-4-1 to -14 (1953); N.Y. EXECUTIVE LAW §§ 290-301; N.Y. EDUC. LAW § 313; ORE. REV. STAT. §§ 651.010-.030, 659.010-.990 (1957); PA. STAT. ANN. tit. 43, §§ 951-963 (Supp. 1957); R.I. GEN. LAWS ANN. §§ 28-5-1 to -39 (1956); WASH. REV. CODE §§ 49.60.010-.320 (1957); WIS. STAT. §§ 15.85, 15.855 (1957) (Governors Commission on Human Rights); WIS. STAT. §§ 101.02-06, 111.31-.37 (1957) (Industrial Commission). Two new states have recently enacted FEPC bills—California and Ohio. Both laws ban discriminatory practices by labor organizations and both have enforcement provisions. AFL-CIO News, Apr. 25, 1959, p. 1, col. 2.

unlawful certain practices of labor organizations, notably, denying membership to members of minority groups on the basis of race, religion, color or national origin, expelling such persons from membership, or discriminating against them in any manner.[23] Some of these commissions use the "education" approach alone,[24] while others have the power to use "enforcement" procedures when persuasion fails.[25] Although the enforcement procedures are seldom employed,[26] their importance is not to be underestimated. Experience has shown that better results are obtained by persuasion backed up by the right to go into court and get a cease and desist order.[27]

In the limited area in which they operate, the Fair Employment Practice laws are a satisfactory remedy.[28] However, since they extend only to state boundaries, and only a few states have such laws, the problem still remains a national one. Also, it is extremely unlikely that such laws will ever be enacted in any of the Southeastern states.[29]

[23] See, *e.g.*, this provision of the Alaska Code:
(I)t shall be an unlawful employment practice:
. . . .
2. For a labor organization, because of the race, religion, color or national origin of any individual to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by the employer. ALASKA COMP. LAWS ANN. § 43-5-4 (Cum. Supp. 1958).

[24] Ill., Ind., Kan., Md., and Mo. The "education" approach involves a process of informing the public of the scope of the protection against discrimination afforded by the law and of persuading the public to avoid discriminatory practices. The Kansas statute, for instance, merely empowers its commission "to discourage discrimination in employment because of race, religion, color, national origin or ancestry, either by employers, labor organizations, employment agencies or other persons as hereinafter provided." KAN. GEN. STAT. ANN. § 44-1003 (Supp. 1957).

[25] Alaska, Colo., Conn., Mass., Mich., Minn., N.J., N.M., N.Y., Ore., Pa., R.I., Wash., Wis. By "enforcement" power is meant the authority to issue an order requiring one who has been found to be acting in a discriminatory manner to cease and desist from such unlawful practice In these states, the commission may secure a court decree for enforcement of its orders. 3 RACE REL. L. REP. 1085 (1958).

[26] A study of six thousand cases handled over a period of seven years by ten operating commissions shows that only seven culminated in formal hearings and only two of these actually reached the courts. Leland, *We Believe in Employment on Merit, But . . .*, 37 MINN. L. REV. 246, 262 (1953).

[27] *Ibid.* "It is significant that four states that began with laws designed to secure voluntary compliance have shifted over to laws with enforcement provisions. It is interesting to contrast the results achieved under the New York law, which can be enforced, and the Federal FEP which could not. Under the latter certain railroad unions not only refused to alter their policies of Negro exclusion, but also refused even to attend the hearings to which the commission called them. In New York they have eliminated the discrimination and admit members without regard to color." Meiners, *supra* note 21, at 37.

[28] Note that within two years after the New York Law Against Discrimination became effective, racial restrictive clauses in the constitutions of the railroad brotherhoods were either removed or made inoperative in the state of New York, and later, in all states having laws prohibiting such discrimination. Carter, *Practical Consideration of Anti-Discrimination Legislation—Experience Under the New York Law Against Discrimination,* 40 CORNELL L.Q. 40, 51-52 (1954).

[29] None of these states have what could be called a fair employment practice

The only federal Fair Employment Practice Committee, established by executive order in 1941,[30] had no real enforcement power.[31] Though it closed nearly 5,000 cases during its five year existence,[32] the Committee was ineffective against the discriminatory practices of the great railroad brotherhoods.[33] Other executive commissions established by Presidents Truman and Eisenhower are generally limited to discrimination in government service and government contracts.[34] Congress has never enacted a federal Fair Employment Practice Law, and the probabilities of its doing so in the near future appear very slight.[35]

Administrative Remedy

Controversies between an employee or group of employees and a carrier or carriers arising out of collective bargaining agreements in the railway industry are decided by the National Railroad Adjustment Board.[36] The Adjustment Board is composed of thirty-six members, one-half of whom are selected by the rail carriers and the other half by the labor unions. The awards of the Adjustment Board are final and binding upon the parties to the dispute, except in so far as they contain money awards.[37] Thus, if a party succeeds in getting his case before

act. Consider, rather, a South Carolina statute which provides a penalty of up to $100 for permitting persons of different races to work together within the same room in Textile Mills. S.C. CODE § 40-452 (1952).

[30] Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

[31] The Commission was limited to receiving complaints, investigating them, and making recommendations. The Commission could have recommended that parties refusing to cease discriminatory practices should have their war contracts cancelled, but apparently this procedure was not followed. Meiners, *supra* note 21, at 54.

[32] Comment, 56 YALE L.J. 837, 842 (1947).

[33] NORTHRUP, ORGANIZED LABOR AND THE NEGRO 74-75 (2d ed. 1944). The railroad brotherhoods were not alone in defying the Committee. Twenty-six of 35 orders issued by the commission to employers were not complied with; of 10 orders issued to trade unions, only one complied. Comment, 56 YALE L.J. 837, 842 (1947).

[34] A Fair Employment Board within the Civil Service Commission was established by President Truman to prevent discrimination in government service. Exec. Order No. 9980, 13 Fed. Reg. 4311 (1948). President Eisenhower replaced this with the "President's Committee on Government Employment Policy." Exec. Order No. 10590, 20 Fed. Reg. 409 (1955). President Truman also established the "Committee on Government Contract Compliance," Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951), to improve means of obtaining compliance with the requirement that nondiscrimination clauses be put in government contracts. This has been continued and strengthened by President Eisenhower. See Exec. Order No. 10557, 19 Fed. Reg. 5655 (1954). For a study of these nondiscrimination clauses, see Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 VA. L. REV. 837 (1957).

[35] The most advanced step in this direction made by Congress was the enactment of the Civil Rights Act of 1957, 71 STAT. 634 (1957). This is not closely comparable to the state FEP laws and is concerned primarily with the right to vote. See Comment, 56 MICH. L. REV. 619 (1958).

[36] Railway Labor Act, 48 Stat. 1191 (1934), 45 U.S.C. § 153 (1952); ADMINISTRATION OF THE RAILWAY LABOR ACT BY THE NATIONAL MEDIATION BOARD, GOVERNMENT PRINTING OFFICE 26-29 (1958) [hereinafter cited as ADMINISTRATION OF THE RAILWAY LABOR ACT].

[37] ADMINISTRATION OF THE RAILWAY LABOR ACT, *supra* note 36, at 29.

the board and loses, he has no right of appeal. This Board, composed of partisans, one-half of whom are appointed by organizations which do not afford Negroes equal status, is an ineffective remedy for Negro employees seeking redress against the discriminatory practices of the railroad brotherhoods.[38]

The National Mediation Board has the authority to resolve disputes among employees as to the designation of the bargaining representative for a particular craft or class.[39] Unlike the Adjustment Board, the National Mediation Board is an independent agency unaffected by partisan interests.[40] However, it has not provided an effective remedy against racial discrimination in the railroad industry.[41]

The National Labor Relations Board has refused to establish bargaining units based on race[42] and has ruled that the segregation of white and Negro employees into separate locals is not per se a form of racial discrimination.[43] In several cases, the Board has given warning that it will consider revoking certification of a union which denies "adequate representation" to all employees in the bargaining unit for which it has exclusive representation.[44] However, it appears that the Board has not found the facts of any case sufficient to justify revoking any union certification.[45] Apparently, the Board's present position is that discriminatory admission policies of a union will not be considered in determining the appropriate bargaining unit.[46]

[38] For a particularly critical review of some of the Adjustment Board's decisions, see NORTHRUP, ORGANIZED LABOR AND THE NEGRO, *supra* note 2, at 66-71, 101, 248-249.

[39] ADMINISTRATION OF THE RAILWAY LABOR ACT, *supra* note 36, at 11, 14-25.

[40] The Board is composed of three members appointed by the President of the United States with the advice and consent of the Senate. The Board has a staff of mediators in the field, all of whom are selected through civil service. *Id.* at 11.

[41] NORTHRUP, *supra* note 2, at 100. See Brotherhood of Ry. & SS. Clerks v. United Transp. Serv. Employees, 137 F.2d 817 (D.C. Cir. 1943), *rev'd on other grounds*, 320 U.S. 715 (1943).

[42] United States Bedding Co., 52 N.L.R.B. 382, 388 (1943) (union admitted both whites and Negroes without discrimination, but skilled whites were outnumbered in an industrial unit by skilled Negroes).

[43] Atlantic Oak Flooring Co., 62 N.L.R.B. 973 (1945).

[44] *Id.* at 975-76; General Motors Corp., 62 N.L.R.B. 427, 431 (1945); Southeastern Portland Cement Co., 61 N.L.R.B. 1217, 1219 (1945) ("equal representation"); Carter Mfg. Co., 59 N.L.R.B. 804, 806 (1944) ("equal representation").

[45] See Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 439 (1949).

[46] See Balaban and Katz (Princess Theatre), 87 N.L.R.B. 107 (1949); Norfolk So. Bus Corp., 83 N.L.R.B. 115 (1949) (employer cited for refusal to bargain with a local of the Machinists; employer defended on the grounds that it could not be required to bargain with the local because a majority of the employees in the bargaining unit were Negroes and therefore not eligible for membership in the union. This defense was not sustained.); Aaron and Komaroff, *supra* note 45, at 438-46. This view finds some support in § 158 of the Labor Management Relations Act, which makes it an unfair labor practice for a labor organization to restrain employees in the exercise of certain rights, but provides that "this paragaph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 61 Stat. 140 (1947), 29 U.S.C. § 158(b)1(A)

Remedy: Judicial

The United States Supreme Court has not ruled on the question whether a member of a racially excluded group may demand admittance to a union acting as the exclusive bargaining representative for the class of which he is a member.[47] The Supreme Court of California, in a line of cases beginning with *James v. Marinship Corporation*,[48] has held that where the union has a closed shop agreement with the employer, it cannot maintain an arbitrarily closed or partially closed union, but must admit to full membership those of a minority race if they are otherwise qualified.[49] The Supreme Court of Kansas has held that the denial of full membership privileges in the statutory bargaining representative certified under the Railway Labor Act is a violation of rights guaranteed by the fifth amendment to the United States Constitution.[50] In contrast, the Court of Civil Appeals of Texas refused to order plaintiffs admitted to a white local of the Brotherhood of Railway Carmen of America where the Brotherhood maintained a "separate but equal" local for Negro employees.[51] And, in a recent Wisconsin case,[52] the court refused to order a bricklayers' union to admit persons excluded from membership solely because of race. This case is of particular importance because it involves the Wisconsin Fair Employment Statute. The Commission had conducted hearings and recommended that the union admit the plaintiffs to membership. The court held that the recommendations of the Com-

(1952). Compare this express statutory provision with Justice Stone's dictum in the *Steele* case, referring to the Railway Labor Act: *"While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership,* it does require the union, in collective baragining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." (Emphasis added.) Steele v. Louisville & N. R.R., 323 U.S. 192, 204 (1944).

[47] In the representation cases, although it was recognized that Negroes were not members of the union involved, whether or not they could demand admittance to the union was not directly passed on. The representation cases dealt with the duty of the union toward employees once it became the statutory bargaining representative. See note 17 *supra.*

[48] 25 Cal. 2d 721, 155 P.2d 329 (1944).

[49] See, *e.g.*, Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 638, 320 P.2d 494 (1958), *modifying and affirming* 149 Cal. Adv. App. 116, 307 P.2d 1026 (App. Dep't 1957); Riviello v. Journeymen Barbers Union, 88 Cal. App. 2d 499, 199 P.2d 400 (Dist. Ct. App. 1948); Williams v. International Bhd. of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903 (1946); Bautista v. Jones, 25 Cal. 2d 746, 155 P.2d 343 (1944).

[50] Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946). Here the plaintiffs were Negro workmen employed in the railway shops of an interstate carrier. The plaintiff's allegations that they were denied equal privileges of participation and representation in matters within the purview of the National Railway Act and assigned to separate lodges under the jurisdiction of the while local were held to state a cause of acton. The court said that the actions complained of constituted a violation of individual rights guaranteed by the fifth amendment and that injunction was a proper remedy if the facts were proved.

[51] Davis v. Brotherhood of Ry. Carmen of America, 272 S.W.2d 147 (Tex. Civ. App. 1954).

[52] Ross v. Ebert, 275 Wis. 523, 82 N.W.2d 315 (1957).

mission were not judicially enforceable,[53] and that the action of the union was not *state action* so as to subject it to the requirements of the fourteenth amendment.[54]

In the principal case, the court neither discussed nor cited any of the above cases. Though all of them are perhaps distinguishable from *Oliphant*,[55] *Betts v. Easley*[56] is strikingly similar to the principal case on its facts. Both cases involved railway labor unions charged with a statutory duty of representing the employees bringing the suits. In both cases the essential wrong is the denial of the right to participate in union affairs incident to employment. In both cases the denial was based solely on race. Only the method chosen was different. If the partial exclusion of the *Betts* case was unlawful, certainly the present case is stronger on the facts for the plaintiffs, since their status is one of *total* exclusion.

It is submitted that the Kansas Court in *Betts* took a more realistic attitude toward the denial of full membership privileges than did the Sixth Circuit in the principal case. It would seem that the same reasons which prohibit a union acting as statutory bargaining agent from negotiating a racially discriminatory contract should also prohibit it from arbitrarily denying membership privileges to a group of the employees it represents; also, that a union which derives its exclusive power to represent a class by virtue of a federal statute cannot excuse its discriminatory admission policies on the grounds that it is a private voluntary organization. In denying relief to the plaintiffs in the principal case, the court has failed to forge the missing link in the chain of judicial remedies necessitated by the problems of racial discrimination in union membership.[57]

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[53] Following this case, the Wisconsin statute was rewritten so as to provide for enforcement powers. Wis. Laws 1957, ch. 266. For a discussion of the new law, see, Comment, 1958 WIS. L. REV. 294.

[54] See note 52 *supra*.

[55] The *Marinship* case, *supra* note 48, involved a closed shop in conjunction with a closed or partially closed union. The court expressly did not pass on the question as to "whether or not the union, in absence of a closed shop agreement, would be required to open its doors to all qualified employees." 25 Cal. 2d 721, 745, 155 P.2d 329, 342 (1944). The Texas case is distinguishable because it involved the maintenance of two separate but self-governing locals. Davis v. Brotherhood of Ry. Carmen of America, *supra* note 51. In the *Wisconsin* case, the bricklayers union was not the statutory bargaining agent for the persons seeking admittance. Ross v. Ebert, *supra* note 52. This distinguishes it from the *Betts* and *Oliphant* cases, where the plaintiffs were members of the class which the union had a statutory duty to represent.

[56] 161 Kan. 459, 169 P.2d 831 (1946). See note 50 *supra*.

[57] The courts are quite correct in holding that the statutory bargaining agent has a duty to represent fairly those within the unit for whom it bargains, even though they are not members of the union. However, the weakness of the rationale of these cases is in the tacit assumption that the duty of fair representation does not, of itself, require equal participation in union membershp. The most obvious